IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

82-6267

CONNIE RAY EVANS,
Petitioner,

vs.

STATE OF MISSISSIPPI,
Respondent.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF MISSISSIPPI

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

BILL ALLAIN, ATTORNEY GENERAL
STATE OF MISSISSIPPI

BY: CATHERINE WALKER UNDERWOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

and

BY: AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

OF COUNSEL

Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

QUESTIONS PRESENTED

I.

Whether, in this capital case, petitioner may raise an issue not presented in the state courts and whether evidence that petitioner single-handedly executed an innocent store clerk as he knelt with his hands behind his back, satisfies the mandate of Enmund v. Florida, ___U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982), which provides that intent may be properly shown by evidence that the petitioner actually killed the victim?

II.

Whether petitioner may belatedly raise issues not presented at the state court level and whether the existence of four aggravating circumstances, found by the state Supreme Court to be supported by the evidence, validate and underpin a sentence of death?

III.

Whether a prospective juror was properly excused for cause on her statement that she positively could not return a verdict recommending the death penalty in this case?

IV.

Whether petitioner may raise ineffectiveness of counsel before this Court and whether he was entitled to a court appointed psychiatric expert where he was determined competent to stand trial by a neutral psychiatrist, he did not request appointment of his own expert, and there was absolutely no evidence that he was insane or suffering from diminished mental capacity?

V.

Whether petitioner may raise questions which are not of federal substance and whether the state court properly determined admissibility of evidence during the sentencing phase?

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BRIEF IN OPPOSITION

OPINION BELOW

The opinion of the Supreme Court of Mississippi is reported as Connie Ray Evans v. State of Mississippi, 413 So.2d 1007 (Miss. 1982). Rehearing was denied on May 26, 1982. A copy of the opinion affirming conviction and sentence is before this Court as an Appendix A to the Petition for Writ of Certiorari.

JURISDICTION

Petitioner seeks to invoke the jurisdiction of this Court by way of Petition for Writ of Certiorari through the authority of 28 U.S.C. 1257(3), and poses a single question for review.

STATEMENT OF THE CASE

Connie Ray Evans pled guilty to capital murder in connection with the shooting death of Arun Pahwa during the commission of an armed robbery of the Jackson, Mississippi, convenience store in which Pahwa was employed. Following a separate trial relative to sentencing (required by M.C.A. § 99-19-101 (Cum. Supp. 1982)), appellant was sentenced to die in the gas chamber. On automatic

appeal to the Mississippi Supreme Court, conviction and sentence were affirmed by a unanimous court on November 3, 1982 and an execution date of December 1, 1982 was decreed. Timely petition for rehearing was filed by petitioner's counsel and denied on December 15, 1982. A stay of execution pending timely filing of this petition was granted by this honorable Court on January 13, 1983.

The facts of the robbery-killing, as found by the Mississippi Supreme Court, follow:

FACTS

> Connie Ray Evans was twenty-one (21) years of age at the time of the homicide. On the night of April 7, 1981, he and Alfonso Artis, age twenty-four (24), met at the Alamo Theater on Farish Street in the City of Jackson, Mississippi, and planned to rob R.J.'s Food Center on Lynch Street. They considered the fact that gunplay might be involved in the robbery. About 6:30 the following morning, Artis went to the house where Evans lived with his mother and stepfather, and they left together for the R.J. Food Center. Upon arrival there, they walked by the store on two occasions but did not enter because customers were present. After waiting approximately one-half hour they began the robbery. Artis went inside with a gun while Evans waited outside and watched for trouble. Artis drew the gun on Arun Pahwa, the store attendant, and forced him at gunpoint to get on his knees behind the counter. Evans entered the store, received the gun from Artis, held it on Pahwa and guarded him while Artis checked the cash register. Artis could not open the cash drawer, and Pahwa was made to get up from the floor, open the cash register and then was forced to kneel again. Artis collected money from the cash register and then searched and emptied Pahwa's pockets and wallet.
>
> Evans shot Pahwa in the head as he knelt motionless behind the counter and the two ran out the door. They had obtained approximately one hundred forty dollars ($140.00) in the robbery. Artis took off his shirt and wrapped the gun in it as they ran. Later, he gave the gun to Evans, who wiped away some of the fingerprints, and they hitchhiked to appellant's brother's house where Evans hid the gun behind a clock. They left there, caught a bus to the downtown area, and spent most of the money on new clothes. That night, they went to a movie, drank beer at a local club, then separated and went home. Evans told Artis that he shot Pahwa because "I was cold hearted."
>
> The police were notified of the robbery and murder and went to the scene where they found the cash drawer open and Pahwa lying behind the counter in a pool of blood. The cause of death was a gunshot wound in the head. As a result of police investigation, Artis was apprehended on the night of April 8, 1981, and Evans was arrested seventeen (17) days later

> on April 25, 1981. He stayed on the streets during this time and finally telephoned his mother and decided to give himself up. Evans gave a written confession to the crime. Artis pled guilty to charges of armed robbery and manslaughter and received a sentence of twenty (20) years, with fifteen (15) years suspended. He testified for the State on the trial.
>
> 422 So.2d at 739.

REASONS FOR
DENYING THE WRIT

I. Petitioner did not raise an issue of "intent to kill" in the lower court or on appeal and may not raise that ground for the first time before this Court.

Following an erroneous contention that the record does not reflect a factual finding that he intended to kill the victim, petitioner asserts that his sentence of death thus contravenes the Eighth Amendment of the United States Constitution. Although this claim may be refuted in substance via brief discussion, the state would first and foremost suggest that consideration of the issue is procedurally barred by petitioner's failure to present it to the lower trial court or the state supreme court. Certainly it is at this juncture well-settled that federal courts "will not decide federal constitutional issues raised for the first time on review of state court decisions." Cardinale v. Louisiana, 394 U.S. 437, 89 S.Ct. 1162, 22 L.Ed.2d 398 (1969). The reasoning behind this rule and the effect of its operation were explained further as follow:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, O'Connor v. Ohio, 385 U.S. 92, 17 L.Ed.2d 189, 87 S.Ct. 252 (1966), they should be given the first opportunity to consider them.
>
> (394 U.S. at 439, 22 L.Ed.2d at 400)

Affirmed in the subsequent decisions of Street v. New York, 394 U.S. 576, 89 S.Ct. 1354, 22 L.Ed.2d 572 (1969) and Webb v. Webb, 451 U.S. 493, 101 S.Ct. 1889, 68 L.Ed.2d 392 (1981), this rule mandates absolute bar of petitioner's claim before this Court.[1/]

Assuming petitioner had properly raised and preserved his claimed lack of intent to kill, the record is replete with evidence that petitioner actually killed Arun Pahwa, evidence which was conclusively held to prove intent in Enmund v. Florida, __U.S. ___, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982). Enmund's petition for certiorari was granted, ___ U.S. ___, 70 L.Ed.2d 246, 102 S.Ct. 473 (1981), to consider the validity of the death penalty under the Eighth and Fourteenth Amendments "'for one who neither took life, attempted to take life, nor intended to take life.'" Enmund, supra, 73 L.Ed.2d at 1145. A review of the opinion reveals that this question was consistently considered in the disjunctive rather than the conjunctive throughout.

> It was thus irrelevant to Enmund's challenge to the death sentence that he did not himself kill and was not present at the killings; also beside the point was whether he intended that the Kerseys be killed or anticipated that lethal force would or might be used if necessary to effectuate the robbery or a safe escape.
>
> 73 L.Ed.2d at 1146.
>
> While the current legislative judgment with respect to imposition of the death penalty where a defendant did not take life, attempt to take it, or intend to take life is neither "wholly unanimous among state legislatures," Coker v. Georgia, 433 U.S., at 596, nor as compelling as the legislative judgments considered in Coker, it nevertheless weights on the side of rejecting capital punishment for the crime at issue.
>
> 73 L.Ed.2d at 1149.

1/ The contention that the state court raised the intent question sua sponte by noting petitioner's testimony that he "didn't mean to do it and was sorry" (See petition at 5) is utterly specious. Assuming this mere inference did in some way raise the issue, it must then ben assumed that the state supreme court "implicitly rejected . . . the federal claim." Webb, supra.

> That is not relevant to this case, however. Rather at issue is the number of states which authorize the death penalty where the defendant did not kill, attempt to kill, or intend to kill.
>
> 73 L.Ed.2d at 1149 n. 15.
>
> Petitioner's argument is that because he did not kill, attempt to kill, and he did not intend to kill, the death penalty is disproportionate as applied to him, and the statistics he cites are adequately tailored to demonstrate that judges - and perhaps prosecutors as well - consider death a disproportionate penalty for those who fall within his category.
>
> * * *
>
> Although the judgments of legislatures, juries and prosecutors weigh heavily in the balance, it is for us ultimately to judge whether the Eighth Amendment permits imposition of the death penalty on one such as Enmund who aids and abets a felony in the course of which a murder is committed by others but who does not himself kill, attempt to kill, or intend that a killing take place or that lethal force will be employed. We have concluded, along with most legislatures and juries, that it does not.
>
> 73 L.Ed.2d at 1151.
>
> Enmund himself did not kill or attempt to kill; and as considered by the Florida Supreme Court, the record before us does not warrant a finding that Enmund had any intention of participating in or facilitating a murder . . . . Enmund did not kill or intend to kill and thus his culpability is plainly different from that of the robbers who killed; yet the state treated them alike and attributed to Enmund the culpability of those who killed the Kerseys. This was impermissible under the Eighth Amendment.
>
> 73 L.Ed.2d at 1152.

The inapplicability of Enmund to petitioner's case is obvious and total. Petitioner pled guilty to actually killing Arun Pahwa by shooting him in the head with a handgun. Certainly, regardless of any ambiguity a claimant might seek to squeeze from the opinion in Enmund, it is well-established that one who actually kills is not afforded escape from capital punishment by Enmund's meaning.

Additionally, petitioner was found to have killed to avoid lawful arrest, a factor set out as an aggravating circumstance in M.C.A. § 99-19-101 (4)(e) (Supp. 1981). This finding, unchallenged

by petitioner, has been determined to embody proof that the murder was for a deliberate purpose and thus, was intentional. As held in the recent case of Gray v. Lucas, 677 F.2d 1086, (5 Cir. 1982), and stated forcefully in the petition for rehearing, Gray v. Lucas, 685 F.2d 139, 140 (5 cir. 1982), a "finding (of murder to avoid arrest) is equivalent to a finding of intent."

With a finding of intent having been made, even a properly preserved claim of this nature would be meritless.

II. Whether petitioner may belatedly raise issues which were not timely presented to the state courts and whether the existence of four aggravating circumstances validates and underpins a sentence of death?

A. This claim is barred from review due to failure of petitioner to raise it in proper context at the state Court level.

The precise issue presented by this question is injected for the first time into the case at this level. In having failed to address the claim in his petition for rehearing before the Mississippi Supreme Court, petitioner has run afoul of the rule in Cardinale, supra, Street, supra, and Webb, supra barring consideration of claims not presented to the state courts for consideration. Accordingly, the writ prayed for should be denied.

B. The four aggravating circumstances as basis for imposition of death penalty were valid considerations for the jury.

Petitioner raises the problem of Zant v. Stephens, 631 F.2d 397 (5th Cir. 1980) posing situation of an appellate review which invalidates the consideration of one aggravating circumstance for purposes of the death penalty and the consequential validity of death penalty. In support of this contention, petitioner unjustifiably construes the opinion of the State Supreme Court as having found one of the four aggravating circumstances, i.e., the heinous, cruel and atrocious nature of the murder, to be incorrectly applied as unsupported by the evidence. This farreaching conclusion cannot be conservatively adduced from a reading of the opinion in its pertinent parts:

> In the case sub judice, the victim was forced to kneel on the floor behind the counter with a .38 caliber revolver pointing at his head,

> he was made to stand up at gunpoint and open the cash register, and again was forced to kneel on the floor with the revolver still pointing at his head. He was physically assaulted by one of the robbers emptying his pockets, all occurring over a short period of time. From those facts, the jury could consider mental torture and aggravation which the victim probably underwent, and to determine whether or not the murder under all the facts and circumstances was especially heinous, atrocious or cruel. Even though it may be said that the facts of the homicide do not pass constitutional muster on the aggravating circumstance of being especially heinous, atrocious or cruel, three (3) other aggravating circumstances were proved by overwhelming evidence. (emphasis added)

Evans v. State, 422 So.2d 737,743 (Miss. 1983)

Clearly, the state Court explicitly recognized that under the particular set of facts, it was within the jury's province to consider the "mental torture and aggravation" that the deceased suffered. Accordingly, as evident by the imposition of the death penalty partly based on the aggravating circumstance at issue, the jury did find that the instant facts were sufficient to support consideration of the "heinous, atrocious and cruel" factor of the murder./1 The Court's opinion in no way determined that the "heinous, atrocious and cruel" factor was invalid in the case sub judice. Rather, the legal sufficiency of the aggravating circumstance was expressly recognized. The language of the opinion challenged is at best mere surplusage to the Court's determination that the aggravating circumstance of the murder being "especially heinous, atrocious and cruel" was legally sufficient and supported by the evidence. Thus, petitioner's contention that there is a Zant v. Stephens problem is without merit./2

/1 The Mississippi Supreme Court's interpretation of this aggravating circumstance has been approved as constitutional by the Fifth Circuit Court of Appeals in Gray v. Lucas, 685 F.2d 139 (5 Cir. 1982)

/2 Assuming the court had found the challenged circumstance factually insufficient, the three remaining aggravating circumstances protect the validity of the sentence. Quite clearly, the problem encountered in Zant v. Stephens does not exist where

III. A prospective juror who makes unshakingly clear her inability to consider imposing the death penalty in the case under consideration is properly excused from jury service under the teachings of Witherspoon and its progeny.

Exlcusion of venireman Odom for conscientious objection to capital punishment followed extensive voir dire in which she forcefully stated numerous times that she could not vote for the death penalty in a case where a robbery was committed and a single individual was killed. The opinion of the Mississippi Supreme Court, specifically that portion upholding the exclusion of Ms. Odom, is not at variance with the applicable decisions of this Court, thus, the issue here raised does not warrant judicial response.

In summary, petitioner's position is that since Ms. Odom recognized that there might be some abstract factual scenario in which she could consider imposing the death penalty, her exclusion was improper under Witherspoon v. Illinois, 391 U.S. 510, 20 L.Ed.2d 776 (1968). This argument proceeds in absolute blindess to the decided preponderance of the colloquy between Ms. Odom and counsel in which she made crystally clear her inability to even consider the death penalty in this case. It is beyond debate that potential jurors may be culled from service where

> Their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's guilt.

Adams v. Texas, 448 U.S. 38, 100 S.Ct. 2521, 65 L.Ed.2d 581 (1980), quoting from Witherspoon, 391 U.S. 510, 519.

In the present case, the Mississippi Supreme Court concluded, after citing and discussing Witherspoon, that the exclusion of Ms. Odom was correct in light of her professed inability to consider imposing death in this case. This conclusion is in

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/2 (cont'd) the invalid circumstance is flawed merely by evidentiary insufficiency rather than unconstitutionality. In support, see Ford v. Strickland, 696 F.2d 804, 814 (11 Cir. 1983), Williams v. Maggio, 679 F.2d 381, 390 (5 Cir. 1982), Zant v. Stephens, 297 So.2d 1 (Ga. 1982) (on recertification from this court).

conformity with the Fifth Circuit Court of Appeals' recent decision in Williams v. Maggio, 679 F.2d 381 (5 Cir. 1982). Therein, the Court crystallized somewhat the inherent wisdom in viewing death penalty related exclusion of jurors from a reading of the entire voir dire rather than from a narrow and limiting focus on talismanic professions of absolute opposition to the entire concept of capital punishment. The following excerpt from Williams is particularly appropos in response to petitioner's claim before this Court:

> Petitioner charges that Ms. Brou's responses fall far short of demonstrating automatic opposition to the death penalty. He attributes the absence of Witherspoon talismanic responses on the record to the State's failure to propound hard questions about opposition to the death penalty. We disagree. If one examines the underscored portion of her statement, one clearly finds that she did state that she could not return a death sentence. When the prosecutor inquired again to assure that she could not consider this penalty, Ms. Brou responded that she did not think she could do it. When this response is viewed in conjunction with her previous statement of clear opposition to the death penalty, the record of automatic opposition to the death penalty is established.
>
> Witherspoon and its progeny do not mandate that a prospective juror aver that she would refuse to consider the death penalty in every case that could possible arise. If she knows enough about the case to know that she could not consider imposition of the death penalty regardless of what evidence might be presented, she must be excused. Ms. Brou's responses demonstrate that she would be unwilling to consider the death penalty where the crime charged was murder committed during a robbery. She does leave open the possibility that she would consider this penalty in a more "hideous" case. Her unwillingness to do so here, however, is firm.
>
> By means of this appeal, petitioner asks this Court to narrow further the stiff requirements of Witherspoon and its progeny and, in this Court's opinion, thereby infringes the State's right to an impartial jury that is willing to consider all penalties provided by law. According to petitioner's analysis, exclusion of a venireman is impermissible unless he states in response to all questions that he absolutely refuses to consider the death penalty. An equivalent response framed in any other reasonable manner is judged to demonstrate that the individual's position is not firm. We reject such a rigid, unthinking interpretation of Witherspoon. Form will not be placed over substance.
>
> 679 F.2d at 385-386 (emphasis added)

The exclusion of Ms. Odom from jury service is in full adherence to constitutional guidelines and was not error.

IV. Failure to Request Court-Appointed Psychiatric Expert may not be Charged as Ineffective Assistance Where Such Claim was Not Raised in the Lower Court, and would be Meritless if properly preserved for Review.

Petitioner's attempt to avoid procedural waiver of his claim of ineffective assistance, made for the first time in this petition, rests on a single statement by the trial judge that the defense was represented by "an experience and capable attorney." (Petition at 6) He cannot, by use of such an offhand comment, invoke the jurisdiction of this Court and has totally waived any constitutional claim based on assistance of counsel by his failure to provide the state courts with a meaningful signal of his complaint. As pointed out earlier in this response, federal constitutional claims raised for the first time before this court are barred from consideration, and in present application, this rule dictates dismissal of the petitioner's claim herein. Cardinale, supra, Street v. New York, supra, Webb, supra.

Assuming proper preservation of the point, it still appears wholly witout merit. In essence, petitioner would have this Court conclude that his trial counsel was ineffective for failing to secure his own competency determination of petitioner. Surely had trial counsel done this, he would have defeated his own strategy. In seeking to plead guilty to capital murder, it was in the best interest of petitioner that his counsel show his client competent to make such a plea, rather than attack competency as suggested in this petition.

The record in this case bears out not a single shred of proof that mental capacity was an issue in the crime or later trial. Petitioner's defense was one of remorse. Having had that defense fail, he seeks now to change horses in mid-stream and ride to reversal on a claim that a psychiatric defense was obvious. This claim is totally devoid of merit. Had the state

court been presented with timely submission of the issue of competent counsel, the conclusion would have it that trial counsel made a reasoned strategic decision to rely on petitioner's tender age, lack of significant criminal history, and remorse to sway a merciful verdict from the jury. In the absence of any evidence tending to infer that petitioner was mentally incompetent, this strategy defies assault.

V. Petitioner's Claim of Contaminating Evidentiary Interplay between the Guilt and Punishment Phases of his Trial dies not present a Federal Question and is Barred from this Court's Review.

Lastly, petitioner alleges that evidence rendered conclusive by this guilty plea was improperly introduced during the penalty phase. Petitioner has not isolated or voiced any constitutional ramifications of his claimed error, thus, evidentiary admissibility remains in this case purely a matter of state law beyond this Court's jurisdiction to review.

In substance, this Mississippi Supreme Court properly resolved this same claim on review below, concluding as follows:

> Appellant urges that certain evidence and exhibits introduced were erroneous and prejudicial since he pled guilty to the robbery-murder and that proof should have been limited to matters not admitted in his guilty plea. An orderly and coherent procedure in the sentencing phase requires proof of the manner in which the homicide was committed. Facts relevant to an aggravating circumstance are competent. The statute sets forth eight (8) aggravating circumstances, any one, or more, of which may be proved.
>
> (court's opinion at 7-8)

The court proceeded to legitimate all the evidence challenged as properly relating to the aggravating circumstances and/or the manner in which the homicide was committed. This finding negates petitioner's current argument. The state would suggest that implicit in the Mississippi Supreme Court's holding is the recognition that capital defendants may not use a plea of guilty to foreclose any evidence during sentencing of the manner and circumstance of the killing. To allow such a result would be to

impose the serious burden of determining sentence on a jury ignorant of many of the facts of the crime. Capital sentencing statutes are geared to constitutional conformity and cannot be so easily tampered with by trial strategy lest defense counsel lead the way into arbitrary infliction of sentence.

CONCLUSION

The state urges that the petition in this case be denied.

Respectfully submitted,

BILL ALLAIN, ATTORNEY GENERAL

BY: CATHERINE WALKER UNDERWOOD
SPECIAL ASSISTANT ATTORNEY GENERAL

and

BY: AMY D. WHITTEN
SPECIAL ASSISTANT ATTORNEY GENERAL

OF COUNSEL

Post Office Box 220
Jackson, Mississippi 39205
(601) 359-3680

CERTIFICATE

I, Amy D. Whitten, Special Assistant Attorney General for the State of Mississippi, do hereby certify that I have this day mailed, first class postage prepaid, a copy of the foregoing Brief In Opposition to Petition For Writ of Certiorari To The Supreme Court of Mississippi to Honorable David M. Corwin, 140 Henry Street, Brooklyn, New York 11201.

This, the 12th day of April, A.D., 1983.

SPECIAL ASSISTANT ATTORNEY GENERAL